HSBC Bank (M) Bhd v Jejak Maju Resources Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT5-22–758 OF 2009
AZIMAH OMAR JC
20 AUGUST 2014

Civil Procedure — Stay of proceedings — Application for — Action for claim of defrauded money — Stay of civil suit pending completion of criminal proceedings — Whether there were special circumstances to grant stay order — Whether there was prejudice against plaintiff from alleged late filing of stay application — Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ss 4(1), 44(1) & 54(3) — Penal Code s 420 — Rules of Court 2012 O 4 r 1(1)

The plaintiff had lodged a police report that they have been defrauded by the first till sixth defendants for the sum of USD5.4m. The plaintiff commenced this civil suit and claimed for damages of the said sum from all the defendants for conspiracy to defraud. Investigations also revealed that there were reasonable grounds to suspect that an offence under sub-s 4(1) of the Anti-Money Laundering and Anti Terrorism Financing Act 2004 ('the AMLATFA') was being committed. All the monies in the defendants' accounts were seized and froze, pursuant to ss 44(1) and 50(1) of the AMLATFA. The amount seized was approximately USD3.327m ('the monies'). The plaintiffs also obtained a mareva injunction to restrain the defendants from dealing with the monies. The sixth defendant was charged under s 4(1)(a) of the AMLATFA and s 420 of the Penal Code. The fourth defendant was also charged under s 4(1)(a) of the AMLATFA. The criminal cases were heard together by the sessions court judge ('the SCJ') and both the civil suit and the criminal proceedings involved the same parties and the same facts. At the end of the prosecution's case, the defendants were acquitted and discharged. The SCJ also made an order pursuant to s 61 of the AMLATFA for an inquiry to be conducted in respect of the monies to determine its rightful owner. The fifth and sixth defendants filed the present application for an order to stay the present civil suit pending the disposal of the inquiry. The defendants contended that under O 4 r 1(1) of the Rules of Court 2012 ('the ROC'), the stay should be granted as both the inquiry and the civil suit involved the same question of law and facts and the rights to relief claimed in both proceedings arose out of the same transaction; and the civil suit could not continue as the institution or continuation of any civil proceedings in respect of properties which had been seized under AMLATFA was prohibited under s 54(3) of the AMLATFA. In opposing the application, the plaintiff argued that, inter alia, there was no duplicity of proceedings; the civil court was the more suitable forum; and the application was filed at a late stage, made in bad faith and

prejudicial to the plaintiff; whether special circumstances had arose to grant the stay of proceedings; whether s 54(3) of the AMLATFA applied; and whether the plaintiff was prejudiced from the allegedly late filing of the stay application.

Held, allowing encl 60:

(1) There would be duplicity of decisions which would result in contradictory decisions by the two courts. The duplicity here would be the decision between the sessions court inquiry and the High Court. Both of the two actions would achieve the same effect relating to the monies in which both of the two actions would ultimately decide which party was entitled to the monies. This might give rise to two conflicting decisions on the same monies. This situation fell squarely into the category of special circumstances. A stay of proceedings should be granted in order to avoid unnecessary contradictions and appeal processes (see paras 28–29).

(2) Section 54(3) of the AMLATFA was not applicable in the present case as the disputed subject matter was monetary in nature. Section 54(3) of the AMLATFA dealt only with seized property under s 51 of the AMLATFA. The calculation of time could not be from the time the plaintiff had filed this civil suit because the inquiry was only ordered in September 2013. Only then did the defendant have the justification to apply for a stay of proceedings. As such, a stay order would certainly not prejudice the plaintiff as the stay order would only be putting a halt to the plaintiff's claim in respect of the tortious liability against the defendants but not in respect of the monies. Since the plaintiff had taken steps to participate in the inquiry, the plaintiff should not complain of prejudice (see paras 32–33).

[Bahasa Malaysia summary

Plaintif telah membuat laporan polis bahawa mereka telah ditipu untuk sejumlah USD5.4 juta. Plaintif memulakan tindakan sivil ini dan menuntut untuk ganti rugi jumlah tersebut daripada kesemua defendan bagi konspirasi untuk menipu. Siasatan juga menunjukkan bahawa terdapat alasan munasabah untuk mengesyaki bahawa kesalahan di bawah sub-s 4(1) Akta Pengubahan Pencegahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2004 ('AMLATFA') dilakukan. Kesemua wang di dalam akaun defendan dirampas dan dibekukan, berikutan ss 44(1) dan 50(1) AMLATFA. Jumlah yang dirampas adalah lebih kurang USD3.327 juta ('wang tersebut'). Plaintif-plaintif juga memperolehi injunksi mareva untuk menghalang defendan-defendan daripada berurusan dengan wang tersebut. Defendan keenam dituduh di bawah s 4(1)(a) AMLATFA dan s 420 Kanun Keseksaan. Defendan keempat juga dituduh di bawah s 4(1)(a) AMLATFA. Kes-kes jenayah didengar bersama oleh hakim mahkamah sesyen ('HMS') dan kedua-dua tindakan sivil dan prosiding jenayah melibatkan pihak yang sama

dan fakta yang sama. Pada akhir kes pihak pendakwaan, defendan-defendan dibebaskan dan dilepaskan. HMS juga membuat perintah berikutan s 61 AMLATFA untuk siasatan dijalankan berkaitan wang tersebut untuk menentukan pemilik yang sah. Defendan kelima dan keenam memfailkan permohonan ini untuk perintah untuk menangguhkan tindakan ini sementara menunggu perlepasan siasatan tersebut. Defendan-defendan berhujah bahawa A 4 k 1(1) Kaedah-Kedah Mahkamah 2012 ('KKM'), penangguhan patut diberikan kerana kedua-dua siasatan dan tindakan sivil melibatkan persoalan undang-undang dan fakta yang sama dan hak kepada relief yang dituntut di dalam kedua-dua prosiding berbangkit daripada transaksi yang sama; dan tindakan sivil tidak dapat diteruskan sebagai institusi atau sambungan apa-apa prosiding sivil berkaitan hartanah yang dirampas di bawah AMLATFA dilarang di bawah s 54(3) AMLATFA. Dalam menentang permohonan tersebut, plaintif berhujah bahawa, antara lain, tidak terdapat kependuan prosiding; mahkamah sivil adalah forum yang lebih sesuai; dan permohonan difailkan pada peringkat akhir, dibuat dengan niat jahat dan memprejudiskan plaintif; sama ada keadaan khusus telah berbangkit untuk memberikan penangguhan prosiding; sama ada s 54(3) AMLATFA terpakai; dan sama ada plaintif diprejudiskan daripada pemfailan lewat permohonan penangguhan yang didakwa tersebut.

Diputuskan, lampiran 60 dibenarkan:

(1) Terdapat kependuaan keputusan yang akan mengakibatkan keputusan bertentangan oleh kedua-dua mahkamah. Kependuan di sini adalah keputusan di antara siasatan mahkamah sesyen dan Mahkamah Tinggi. Kedua-dua tindakan tersebut akan mencapai kesan yang sama berkaitan kepada wang tersebut di mana kedua-dua tindakan tersebut akan akhirnya memutuskan pihak yang mana berhak kepada wang tersebut. Ini akan membangkitkan kepada dua keputusan bercanggah atas wang yang sama. Keadaan ini terangkum tepat dalam kategori keadaan khusus. Penangguhan prosiding patut diberikan untuk mengelak percanggahan yang tidak perlu dan proses rayuan (lihat perenggan 28–29).

(2) Seksyen 54(3) AMLATFA tidak terpakai dalam kes ini kerana perkara yang dipertikaikan adalah berbentuk wang. Seksyen 54(3) AMLATFA berurusan hanya dengan hartanah yang dirampas di bawah s 51 AMLATFA. Pengiraan masa tidak boleh dari tempoh plaintif memfailkan tindakan sivil ini kerana siasatan yang diperintahkan pada September 2013. Hanya pada masa tersebut defendan mempunyai bidang kuasa untuk memohon bagi penangguhan prosiding. Oleh itu, perintah penangguhan pasti tidak prejudis kepada plaintif memandangkan perintah penangguhan hanya akan diberhentikan kepada tuntutan plaintif berkaitan liabiliti tort terhadap defendan-defendan tetapi bukan berkaitan wang tersebut. Memandangkan plaintif telah mengambil langkah untuk menyertai

dalam siasatan tersebut, plaintif tidak patut mengadu mengenai prejudis (lihat perenggan 32–33).]

Notes

For cases on application for stay of proceeding, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 8518–8564.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application [1993] 3 MLJ 514, HC (refd)
Hj Abdul Majid Khan (NRIC No H041 1079), Re; ex parte Bank Bumiputra Malaysia Bhd [2005] MLJU 233; [2006] 8 CLJ 534, HC (refd)
Hong Leong Bank Bhd v Pendakwa Raya [2009] 8 CLJ 33, HC (refd)
JH Rayner (Mincing Lane) Ltd & Ors v Manilal & Sons (M) Sdn Bhd & Anor [1987] 1 MLJ 312 (refd)
Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213, CA (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)
Leong Poh Shee v Ng Kat Chong [1966] 1 MLJ 86 (refd)
Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd [1988] 2 MLJ 184, SC (refd)
PP v Thong Kian Oon & Ors [2012] 10 MLJ 140, HC (refd)

Legislation referred to

Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ss 4(1), (1)(a), 44(1), 50(1), 51, 54(3), 61
Penal Code ss 34, 420
Rules of Court 2012 O 4 r 1(1)

Fazillawati Jaafar (Benjamin Dawson) for the plaintiff.
Nur Amalina Haris (KF Ee & Co) for the fifth and sixth defendants.

Azimah Omar JC:

[1] This is an application filed by the fifth and sixth defendants for an order for this civil suit to be stayed pending the disposal of the Malacca Sessions Court Criminal Case Nos 62–66, 114, 115 and 125 of 2009 ('the criminal trial') and the inquiry under s 61 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the AMLATFA') arising from the criminal trial.

[2] As one of the defendants in the present case was involved in the criminal trial, the factual background and chronology of events of this civil suit and the criminal trial must be set out in order to fully understand the circumstances of the case which had led the fifth and sixth defendants to file in this application. The factual background and chronology of events revealed from the affidavits by both parties and the cause papers are as follows:

(a) the plaintiff is a banker running its business under the name of HSBC Bank (M) Bhd;

(b) Jejak Maju Resources Sdn Bhd, a RM2 company ('the first defendant'), Plustrans Resources Sdn Bhd ('the third defendant') and Microvest Engineering Sdn Bhd ('the fifth defendant') are companies having their registered offices at 5A-1, 1st Floor, Jalan Memanda 7, Ampang, 03-32, 3rd Floor, PKNS Complex, Shah Alam and No 117, Block A Damansara Intan No 1, Jalan SS 20/27, Petaling Jaya respectively;

(c) the second defendant (Vijayalatha a/p Velupillai) was the director of the first defendant, while the fourth defendant was the director of the third defendant and the sixth defendant is the director of the fifth defendant;

(d) the second defendant is also a lawyer running her own legal practice under the name of Messrs Vellupillai & Assoc;

(e) a Brazilian company by the name of Target Trading ('Target'), a valued customer to HSBC Bank Brasil SA Banco Multiplo ('HSBC Brazil') had intended to purchase 'high speed diesel' from Petronas Dagangan Bhd. However, Brazil HSBC was informed that this can only be carried out through a local supply agent;

(f) HSBC Brazil had then contacted the plaintiff to finance the purchase of the diesel by the first defendant, the local supply agent. Thereafter, the first defendant was granted a banking facility by the plaintiff on the basis of a standby letter of credit provided to the plaintiff by HSBC Brazil;

(g) subsequently, a letter of offer dated 29 April 2008 was issued by the plaintiff to the first defendant agreeing to provide banking facilities up to USD5.4m ('the funds') to finance the purchase of the diesel;

(h) on 29 April 2008, the plaintiff had alleged that an instruction was received from HSBC Brazil purportedly made on behalf of Target instructing the plaintiff to transfer the sum of USD4.55m to a Petronas account with Malayan Banking Bhd ('MBB'). On the same day, the plaintiff had also received an insistent request from the first defendant to transfer the same amount into the MBB account;

(i) later, the plaintiff found out that the account number belongs to the third defendant who, the second defendant claimed was a Petronas dealer;

(j) upon request by the second defendant, the plaintiff had also on 2 May 2008 disbursed a sum of USD0.75m to the second defendant's legal firm purportedly for shipping expenses;

(k) the first defendant had defaulted payment of the banking facility granted earlier;

(l) the plaintiff had also later discovered inter alia the following facts:

(i) there was actually no transaction between the first defendant and Petronas;

(ii) documents relating the to the diesel's sale and purchase transactions were confirmed forged documents;

(iii) the third defendant had paid a sum of USD4m to the fifth defendant;

(iv) the third defendant had paid RM1m each to the fourth defendant and a person by the name of Mohd Fuad;

(v) a sum of USD3m was paid by the fifth defendant to the sixth defendant; and

(vi) the entire transaction in connection with the disbursement of USD5.4m by the plaintiff to the first defendant and thereafter to the rest of the defendants was a fraudulent transaction;

(m) on 18 June 2008, the second defendant had lodged a police report against, inter alia, the fifth and sixth defendants, accusing that the fifth and sixth defendants were conspiring with the third defendant to defraud her in the sale and purchase dealings for the diesel;

(n) on 26 June 2008, the plaintiff lodged a police report alleging that they have been defrauded by a syndicate consisting of the above named defendants for the sum of USD5.4m;

(o) as a consequence of the police investigation, it was found that there are reasonable grounds to suspect an offence under sub-s 4(1) of the AMLATFA is being committed, and the authority exercising their powers under ss 44(1) and 50(1) of the AMLATFA had seized and frozen all of the defendants' accounts. The amount seized is approximately USD3.327m ('the monies');

(p) on 21 May 2009, the plaintiff commenced the present action claiming damages for the sum of USD 5.4m from all of the defendants for conspiracy to defraud;

(q) on 18 April 2011, the plaintiff had obtained a mareva injunction to restrain all the defendants from dealing with the funds;

(r) on 3 June 2009, the sixth defendant was charged at the Malacca Sessions Court for an offence under sub-s 4(1)(a) of the AMLATFA;

(s) at the same time the fourth defendant and Mohd Fuad were charged for the predicate offence under s 420 of the Penal Code, which was to be read together with s 34 of the Penal Code. The fourth defendant and Mohd Fuad were also charged for five other offences each under sub-s 4(1)(a) of the AMLATFA; and

(t) all the criminal cases were heard together. The learned sessions judge on 20 September 2013, at the end of the prosecution case, had concluded that the prosecution had failed to prove a prima case against the three accused and ordered all the accused be acquitted and discharged without their defence being called. At the end of the criminal trial, the learned sessions judge had also made an order under s 61 ('the inquiry') of the AMLATFA for an inquiry to be conducted in respect of the monies.

[3] It was the order of the inquiry that have led the fifth and sixth defendants to file this encl 60 applying for an order to stay this civil suit pending the disposal of the inquiry.

[4] The first, second and fourth defendants had failed to file their statement of defence, thereafter judgment in default of defence were entered against them.

[5] The plaintiff had been granted leave to proceed with the action against the third defendant which has been wound up.

[6] For ease of reference, for the purposes of the stay application, the fifth and sixth defendants will be referred to as the defendants.

[7] In applying for the stay order the defendants contended the following:

(a) that, by virtue of O 4 r 1(1) of the Rules of Court 2012 ('the ROC'), this court should stay this present civil suit until the determination of the disposal of the Inquiry as both the Inquiry and the civil suit involved the same question of law and facts and the rights to relief claimed in both proceedings are in respect of or arise out of the same transaction or series of transactions; and

(b) prohibition under s 54(3) of the AMLATFA.

[8] It was submitted by the counsel for the defendants that the question of law and facts as well as the rights to relief claimed for in both of the civil and criminal proceedings are the same. In support of this contention, the counsel for the defendants argued that the second defendant had testified as one of the prosecution witness in the criminal trial in which she had described and explained in detail on how the sum of USD 4.55m was released to the defendants. Another prosecution witness by the name of Mr Chandrasegaran had confirmed that the USD 4.55m was released to the defendants in the manner described by the second defendant.

[9] It was also submitted on behalf of the defendants that the transactions which took place in the criminal proceeding in respect of the funds were the same transactions which were alleged by the plaintiff to have occurred in this civil action. And thus, the counsel contended that the factual matrix in both criminal and civil cases is the same.

[10] The counsel for the defendants had also submitted that the basic question for consideration of the sessions court in the inquiry would ultimately be who the rightful owner of the monies. To determine the rightful owner of the monies, the same facts and transactions in relation to the monies need to be canvassed before the learned sessions judge. The counsel for the defendants further submitted that proceeding with the present civil suit would give rise to a risk of duplicity of proceedings or res judicata. More so, the plaintiff had taken steps to participate in the inquiry. On duplicity of proceedings and res judicata he had referred to the following cases:

(a) *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 Peh Swee Chin FCJ at pp 197–198; and

(b) *JH Rayner (Mincing Lane) Ltd & Ors v Manilal & Sons (M) Sdn Bhd & Anor* [1987] 1 MLJ 312.

[11] It was also submitted by the counsel for the defendants that the present civil suit cannot continue and must be stayed by virtue of s 54(3) of the AMLATFA. The counsel submitted that s 54(3) of the AMLATFA prohibits the institution or continuation of any civil proceedings in respect of the property which has been so seized under the AMLATFA.

[12] Therefore, it was submitted on behalf of the defendants that there arise special circumstances to warrant this court to exercise its unfettered discretion to grant a stay order.

[13] In support of his contention, the counsel for the defendants cited several cases relating to principles guiding the courts in exercising their discretionary powers to grant or to refuse an application to stay proceedings. The cases are namely:

(a) *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213;

(b) *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257;

(c) *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86; and

(d) *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514.

[14] The plaintiff had strongly opposed the defendants' application and forwarded several grounds in opposing it. The grounds can be summarised as follows:

(i) there is no issue of multiplicity or duplicity of proceedings;

(ii) non-disclosure on the part of the defendants who were also acting in an inconsistent manner;

(iii) the civil court is the more suitable forum; and

(iv) the application has been filed at a late stage, was made in bad faith and prejudicial to the plaintiff.

GROUND (i) – THERE IS NO ISSUE OF MULTIPLICITY OR DUPLICITY OF PROCEEDINGS

[15] It was submitted by the counsel for the plaintiff that the civil action filed by the plaintiff is essentially different in all aspects from the criminal proceeding. He further submitted that the two actions are different in terms of the injured party or victim, alleged wrongdoers, causes of action, factual basis in support of the complaint and the wrongdoings and the relief claimed. To convince the court, the counsel for the plaintiff in his written submission had even tabulated all the differences.

GROUND (ii) – NON-DISCLOSURE ON THE PART OF THE DEFENDANTS WHO WERE ALSO ACTING IN AN INCONSISTENT MANNER

[16] It was submitted by the counsel for the plaintiff that both the defendants are not genuine in their application. The defendants had filed encl 60 to stay this civil action on the premise that the inquiry proceeding should be completed first to avoid duplicity of proceedings but at the same time, in contrary, the defendants had also applied to set aside the order of inquiry made by the learned sessions judge disputing the basis which the inquiry was ordered and contended that the monies ought to be returned to defendants.

It is the contention of the plaintiff that the defendants are constantly prevaricating and had acted in an inconsistent manner.

GROUND (iii) – THE CIVIL COURT IS THE MORE SUITABLE FORUM

[17] The counsel for the plaintiff submitted that the civil court is the more suitable forum to adjudicate the plaintiff's claim which is based on tort of conspiracy to defraud. It was further submitted by the counsel for the plaintiff that the inquiry will only confine itself to the issue of ownership of the monies and not the commission of the tort, especially fraud. To support this contention, the counsel for the plaintiff had referred to two cases, namely *Public Prosecutor v Thong Kian Oon & Ors* [2012] 10 MLJ 140 and *Hong Leong Bank Bhd v Pendakwa Raya* [2009] 8 CLJ 33.

[18] It is the contention of the counsel for the plaintiff that the ultimate order that the court can make in the inquiry is whether to release or to forfeit the monies and it does not adjudicate plaintiff's cause of action against the defendants. Hence, it was further contended by the counsel for the plaintiff that the civil court would be the more suitable forum for adjudicating allegations of conspiracy to defraud.

GROUND (iv) – THE APPLICATION HAS BEEN FILED AT A LATE STAGE, WAS MADE IN BAD FAITH AND PREJUDICIAL TO THE PLAINTIFF

[19] It was argued on behalf of the plaintiff that the application by the defendants was too late. The present civil action was commenced by the plaintiff in May 2009 and parties had appeared numerous times before the courts, where witness statements were exchanged between the parties.

[20] The counsel for the plaintiff also contended that the defendants have taken active steps in the civil action and this application was made barely one month before this case is scheduled for hearing on the second trial date ie 13 February 2014. The defendants had written in to the court for an adjournment of the second trial date on the same ground as in encl 60. The high court judge

had adjourned the trial and instructed the defendants to file a formal application. The formal application was not filed by the defendants until two weeks before the third trial date. In addition, the present case had reached an advanced stage where the plaintiff is ready with its witnesses, three of whom are from three different banks and one from the United Kingdom and is scheduled for hearing for the third time on the 8–11 September 2014, whilst the inquiry still has a long way to go. It was therefore contended on behalf of the plaintiff that this civil action should proceed.

DECISION OF THE COURT

[21] The principles in relating to the exercise of court's discretion whether to allow or refuse stay of proceedings had been well-established and well-illustrated in an abundance of authorities. The paramount consideration in allowing or refusing a stay of proceedings is the existence of special circumstances in that particular case warranting the court to exercise its discretionary powers. It is also trite that the principles to be applied in an application for stay of execution are also applicable in an application for stay of proceedings (see *Re Hj Abdul Majid Khan (NRIC No H041 1079); ex parte Bank Bumiputra Malaysia Bhd* [2005] MLJU 233; [2006] 8 CLJ 534).

[22] In the case of *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86, which was cited by the counsel for the defendants, Raja Azlan Shah (as His Majesty then was) had defined special circumstances in the following excerpt:

> Special circumstances, as the phrase implies, must be circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

[23] However, what could constitute special circumstances varies from case to another case and it depends on its own facts and the onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay (see *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257).

[24] Zawawi bin Salleh (JCA) on behalf of the Court of Appeal in the case of *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* in emphasising the unfettered court discretionary power in granting stay, had also outlined several considerations as a guideline to which the courts had considered on what constitutes special circumstances. At p 221, the Court of Appeal had said this:

... Now, what factors or principles will, and should, guide the courts in applications for a stay of an order granted by a court. These factors or principles have been reiterated in very many of cases decided by our courts. The factors or principles so enumerated are in exhaustive, and not all of them are application to every case. Each has its own peculiar principle. Some of the principles to be considered in the motions may be stated as follows:

(a) the courts have an unimpeded discretion to grant or refuse stay. In this, like in all other instances of discretion, the court is bound to exercise that discretion both judicially as well as judiciously and not erratically (see *Serangoon Garden Estate Ltd v Ang Keng* [1953] 1 MLJ 116; *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86;

(b) an unsuccessful party applying for a stay must show 'special circumstances'. What will constitute 'special circumstances' will no doubt vary from case to case. The fact that an appeal would be rendered nugatory if stay was refused is the most common one (see *Kosma Palma Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Markmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 and *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131). The application is not granted as matter of routine and it is not an automatic or mechanical relief slavishly followed after filing an appeal. In every matter or suit before a court of law, whether in its original or appellate stage of proceedings, the court will consider the competing rights of both parties including the applicant and respondent to justice;

(c) there is a need to preserve the res or preservation of the subject matter of litigation. The courts have an obligation to protect the res for the purpose of ensuring that the appeal, if successful, will not be rendered nugatory (see *Erinford Properties Ltd v Cheshire County Counsil* [1974] 2 WLR 749). But where it is shown by affidavit evidence, say by the respondent that the res will not be destroyed or there is in fact no res, an application may not be granted;

(d) where an application is an abuse of the court process, then the stay of proceedings will not be granted. A typical example of abuse of court process is where a suit is duplicated or where a party employs improper and perverse procedure to obtain an advantage undeservedly;

(e) it is important to stress that initiation of a suit in a court of law demands the suit will be heard expeditiously and completed without any inhibition midway. Therefore where an application for stay of proceedings is intended to merely stop or suspend the proceedings, it will be refused. Some applications, on seeing the weakness of their client's case, would resort to application for stay and thereby waste the time of the other party and the court. The party simply cannot resort to the interlocutory of stay proceedings on having the slightest disagreement with any ruling of a trial judge. Courts are enjoined not a encourage such unwholesome practice; and

(f) an application for stay of proceedings must come with clean hands because what he is asking is an equitable relief. Equity will not assist the unclean. That is why the court has to look into the antecedents of the parties.

[25] Having considered the submission forwarded by both the parties and taking cognisance of all the well-established principles in granting stay of proceedings, I will now determine the merits of the defendants' application. I do appreciate that the inquiry before the sessions court and the civil suit in this High Court before me are of two different causes of action. The former, being an inquiry under s 61 of the AMLATFA and the latter, under the tort of conspiracy to defraud. I am also equally minded that the underlying cause and facts behind the two actions, in actual fact rooted from the same set of facts and background. I must also bear in mind that the monies or the subject matter which was seized by the authority are monies related to both actions.

[26] The essential factor in determining the propriety of a stay of proceedings is the existence of special facts and circumstances of a particular case and these special circumstances differ from case to case. And it must be noted that the considerations in determining the existence of special circumstances as laid down in *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* is not exhaustive.

[27] Assuming if I were to proceed with the civil suit and I would have to decide whether or not there was a conspiracy to defraud, consequently I would ultimately have to decide whether the plaintiff is entitled to the damages of USD5.4m being the amount of monies which had been disbursed to the first defendant of which USD4.55m was later, either paid or remitted to the rest of the defendants. Hypothetically, if the High Court finds that there was conspiracy to defraud, the bank would be entitled to recover the funds which had been earlier disbursed in terms of damages of USD5.4m from the defendants inclusive the monies. Hypothetically and equally so, if the sessions court inquiry finds the monies rightfully belongs to the bank, the bank would also be entitled to claim for the return of the monies. Bearing in mind that the monies which were seized and frozen from all the defendants' accounts forms part of the USD5.4m, which was also the subject matter for determination of the sessions court in the inquiry. At the end of the inquiry the sessions judge would ultimately again decide who will be the rightful and the bona fide owner of the monies. Notwithstanding the differences in the cause of action, and/or burden of proof, in my mind, the ultimate consequence and the end-result of both the High Court civil suit and the sessions court inquiry would obviously concern the bona fide rights over the monies. I have said earlier and I reiterate here again that the monies in all of the defendants' accounts which were seized

and frozen forms part of the USD5.4m funds which the plaintiff had disbursed under the letter of credit.

[28] In this situation, special circumstances would arise in which obviously there would be duplicity of decisions which would probably result in contradictory decisions by the two courts. Particularly in this case, the duplicity would be the decision between the sessions court inquiry and the High Court here. I must say that both of the two actions would achieve the same effect relating to these monies in which both of the two actions would ultimately decide which party is entitled to the monies. This may give rise to two conflicting decisions on the same monies. The duplicity here is not so much on the proceedings which saw the same parties' involvement but instead would be the preceding hypotheses, which entails the duplicity of decisions from the proceedings in which both causes of action would decide which party is entitled to the monies.

[29] Thus, the ensuing effect of both decisions may contradict each other even if the two decisions derive from different causes of actions and/or burden of proof. It is my judgment that this situation falls squarely into the category of special circumstances. A stay of proceedings should be granted in order to avoid unnecessary contradictions and appeal processes.

[30] In this regard, I would like to refer to the decision of the Supreme Court in the case of *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 184. In the case of *Lesco Development*, the Supreme Court had already envisaged that it is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter. In this case, the Supreme Court had dealt with a foreclosure proceeding which resulted in an order for sale and a claim for default of payments on the same monies claimed in the foreclosure application. The Supreme Court had held the following:

(a) it is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter;

(b) in this case the hearing of the foreclosure proceeding should have been postponed until the final disposal of the claim on the debt; and

(c) the order of sale should be set aside and the hearing of the foreclosure application be dealt after the final disposal of the claim on the debt.

[31] Although the present case is not factually similar with the case of *Lesco Development*, the underlying principles of the case of *Lesco Development* can be mirrored to that of the present case. This is because and I reiterate again that the present case and the sessions court inquiry would involve the same parties, the same facts and transactions, and the same subject matter ie the monies. Thus, it is equally undesirable, alike the case of *Lesco Development*, to have this High Court here, to try and determine the same subject matter.

[32] With regard to the prohibition under s 54(3) of the AMLATFA raised by the counsel for the defendants, I am in agreement with the plaintiff's counsel that s 54(3) of the AMLATFA is not applicable in the present case as the disputed subject matter here is monetary in nature while s 54(3) of the AMLATFA deals only with seized property under s 51 of the AMLATFA.

[33] With regard to the issue of the application being filed at a very late stage of the proceeding, in bad faith and prejudicial to the plaintiff, my answer to this is that the inquiry under s 61 of the AMLATFA only came about in September 2013 when it was ordered by the sessions judge at the end of the criminal trial on 20 September 2013. By this time, it is acknowledged that the civil suit has reached its advanced stage. However, the calculation of time could not be from the time the plaintiff had filed this civil suit as submitted by the plaintiff's counsel because the inquiry had only been ordered in September 2013. Only upon September 2013 that the defendants would have the justification to apply for a stay of proceedings. A stay order would certainly not prejudice the plaintiff as the stay order would only be putting a halt to the plaintiff's claim in respect of the tortious liability against the defendants but not in respect of the monies. And since the plaintiff has taken step to participate in the inquiry, the plaintiff should not complain of prejudice.

[34] With regards to the defendants' contention that the duplicity would give the plaintiff a second bite of the cherry or double jeopardy, whereby the plaintiff would unjustly be compensated twice from the two actions, which the plaintiff had replied that the decision in this high court would be accounted for in the sessions court inquiry, I do not see the necessity to embark on this issue in view of my earlier findings on the existence of special circumstances in this case.

[35] Based on the aforesaid reasons, the defendants' application in encl 60 is allowed with no order as to costs. Hence, this civil suit is stayed until the disposal of the inquiry at the Malacca Sessions Court.

Enclosure 60 allowed.

Reported by Afiq Mohamad Noor